

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

Joint Application of)
)
)
 AMERICAN AIRLINES, INC.)
 and)
 LINEA AEREA NACIONAL CHILE, S.A.) Docket OST-97-3285
 (**IAN CHILE**))
)
)
 under 49 U.S.C. Sections 41308 and)
 41309 for approval of and antitrust)
 immunity for alliance agreement)
)

DATED: August 13, 1999

**REPLY OF UNITED AIR LINES, INC. AND
MOTION FOR LEAVE TO FILE**

As explained below, recent events demonstrate that it would not be consistent with the public interest for the Department to make final the tentative findings and conclusions set out in Order 99-4-17 without a formal recommendation from the Department of Justice ("DOJ") as to whether the extension of immunity to the American/Lan Chile alliance is likely to reduce competition substantially in any relevant market.¹

¹ United hereby requests leave to file this Reply. On August 7, 1999, a committee of the Transportation Research Board issued a report that raises questions about the Department's administration of its statutory authority to immunize international alliance agreements from the antitrust laws, which are directly relevant to the issues raised in this proceeding. To ensure that the Department addresses these issues in its final order herein, United requests leave to file this Reply, which discusses briefly the TRB committee report. As the report was only issued last week, United could not have included any

(continued...)

1. The Department's jurisdiction to approve alliance agreements between U.S. and foreign air carriers and to immunize those agreements from the antitrust laws contemplates DOJ's active participation in the approval process. In recognition of this, Department officials have repeatedly emphasized that they "work closely with the Department of Justice in reviewing requests for antitrust immunity . . .[, and] rely on DOJ's advice as to the application of . . . [the] antitrust laws to . . . particular . . . [immunity] requests.../ Testimony of Charles A. Hunnicutt, Assistant Secretary of Transportation Before the Antitrust Subcommittee of the Senate Judiciary Committee, March 19, 1998, at 5.

Despite the Department's assurance that it relies upon DOJ's advice in cases where antitrust immunity is being sought, the report recently released by a committee of the Transportation Research Board ("TRB") raises questions about the role of competition policy in DOT's approval of airline alliances. The report questions, in particular, DOT's ability to assess objectively the competitive effects of requests for antitrust immunity in cases where a foreign government has conditioned the acceptance of an Open Skies Agreement on the grant of immunity to

¹ (.continued)
discussion of the report in the timely Objections it filed to Order 99-4-17.

REPLY OF UNITED

Page 3

an alliance between its national carrier and a U.S. partner, as Chile has done here, and as Argentina did in the just concluded negotiations.

Because of the position taken by the Government of Chile, this appears to be precisely the type of case cited in the committee report where the committee is concerned about the objectivity of DOT's competition analyses. Unless the Department intends to validate that criticism of its alliance policy, it needs to demonstrate persuasively on the record in this proceeding that it has objectively reviewed the risks to competition posed by the grant of antitrust immunity to the American/Lan Chile alliance, and that its decision has not been unduly influenced by Chile's insistence that open skies is contingent upon the grant of such immunity.

The surest way for the Department to demonstrate that such concerns are unfounded is to show that its tentative decision to immunize the American/Lan Chile alliance from the antitrust laws is consistent with advice it has received from DOJ, and that immunity is not being granted solely to achieve an Open Skies Agreement under circumstances where DOJ recommended against approval, as it did in the case of American's alliance with the TACA Group carriers. As matters now stand, however, the Department cannot make such a showing because there is no

evidence in the record that it has even received advice from DOJ as to whether approving the proposed American/Lan Chile alliance would be consistent with sound competition policy, let alone that its tentative decision is consistent with that advice.

2. Even though United is a firm proponent of global alliances and open skies agreements, it filed an Objection to Order 99-4-17 because it is firmly persuaded that the loss of competition between Miami and Santiago, Chile that would result from granting immunity to the American/Lan Chile alliance cannot be off-set by bringing into force an Open Skies Agreement with Chile. Open skies and alliances are not ends in themselves, only the means to an end: The opening of international aviation markets to increased competition and the opportunity for carriers to enter or exit city pairs solely in response to marketplace considerations, not governmental route policies. Open skies agreements in themselves do not ensure that markets will perform competitively, only that governmental barriers to entry in the form of designation limitations and frequency and capacity controls are eliminated.

Where open skies exists, however, integrated alliances can provide substantial benefits for consumers by facilitating efficiency-enhancing integration and enabling carriers to extend their networks into markets they could not economically serve

with their own aircraft. In such cases, the reason for extending antitrust immunity to alliances is to permit a level of integration among the participants sufficient to achieve the type of operational and organizational efficiencies that are typically achieved through mergers or acquisitions in other industries, but which are unavailable to air carriers because of the unique international legal constraints on aviation. However, not all alliances are sufficiently pro-consumer and welfare-enhancing to warrant the grant of antitrust immunity, just as all mergers or acquisitions are not approved despite their potential to result in efficiency-enhancing integration.

The Department's responsibility in alliance cases is to evaluate each application for immunity to determine which applications merit approval because, on balance, they enhance consumer welfare and further network-to-network competition, and which do not. As noted above, under the statute, the DOJ is to play a central role in helping the Department perform that calculus. In light of the recent report by a committee of the TRB, the apparent absence of DOJ's participation in this proceeding calls into question both the correctness of the Department's tentative findings in Order 99-4-17, and whether the Department has followed its own announced policy of "work[ing] closely with the [DOJ] in reviewing requests for antitrust

REPLY OF UNITED

Page 6

immunity" To assure the public that it has reviewed the American/Lan Chile alliance objectively and not allowed Chile's insistence that open skies is contingent upon the granting of antitrust immunity to the American/Lan Chile alliance to influence its judgment inappropriately, the Department should not make Order 99-4-17 final until a recommendation by DOJ as to whether that alliance is likely to reduce competition in any relevant market is made a part of the record.

Respectfully submitted,



BRUCE H. RABINOVITZ
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5116

Counsel for
UNITED AIR LINES, INC.

DATED: August 13, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the Reply of United Air Lines, Inc. and Motion For Leave To File on all persons named on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.


Kathryn Dionne North

DATED: August 13, 1999

Charles J. Simpson, Jr.
Lonnie **Anne Pera**
for Lan Chile
Zuckert, Scouff & Rasenberger
888 **17th** Street, N.W.
Suite 600
Washington, DC. 20006

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 **17th** Street, N.W.
Suite 600
Washington, D.C. 20036

Robert E. Cohn
for Delta Air Lines, Inc.
Shaw, **Pittman**, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

David Mar-chick
Deputy Assistant Secretary for
Transportation Affairs
U.S. Department of State
2201 C Street, N.W.
Room 5830
Washington, D.C. 20520

Elliott M. Seiden
Vice President - Law and Government
Affairs
Northwest Airlines, Inc.
901 **15th** Street, N.W.
Washington, D.C. 20006

R. Bruce Keiner, Jr.
for Continental Airlines
Emery Worldwide
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20004

Marshall S. Sinick
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20004

Pierre Murphy
Southern Air Transport
2445 M Street, N.W.
Suite 260
Washington, D.C. 20037

Lawrence M. **Nagin**
USAirways, Inc.
Crystal Park Four
2345 Crystal Drive
Arlington, VA 22227

U.S. **Transcom/TCJ5**
Attention: Air Mobility Analysis
508 Scott Drive
Scott AFB, IL 62225

Roger W. Fones
Antitrust Division
Department of Justice
325 **7th** Street, N.W.
Suite 500
Washington, D.C. 20530

D. Scott Yohe
Senior Vice President-Government
Affairs
Delta Air Lines, Inc.
1275 **K** Street, N.W.
Washington, D.C. 20006

Michael F. Goldman
Bagileo, Silverberg & Goldman
1101 **30th** Street, N. W.
Suite 120
Washington, D.C. 20007

Allan W. Markham
Arrow Air, Inc.
2733 **36th** Street, N.W.
Washington, D.C. 20007-1422

Peter Reaveley
Dade County Aviation Department
Miami International Airport
P.O. Box 592075
Miami, FL 33159

Nathaniel P. Breed, Jr.
for Federal Express
Shaw, **Pittman**, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

R. Tenney Johnson
for DHL Airways
Attorney & Counselor at Law
2121 **K** Street, N.W.
Suite 800
Washington, D.C. 20037

William H. **Callaway**
for Challenge Air Cargo
Zuckert, Scouff & Rasenberger
888 **17th** Street, N.W.
Washington, D.C. 20006

Richard J. Fahy, Jr.
Consulting Attorney
Trans World Airlines, Inc.
900 **19th** Street, N. W.
Suite 350
Washington, D.C. 20006

Alfred J. Eichenlaub
Polar Air Cargo, Inc.
100 Oceangate
15th Floor
Long Beach, CA 90802

David L. Vaughan
Kelley, Drye & Warren
1200 **19th** Street, N.W.
Suite 500
Washington, D.C. 20036

James W. Tello
Filler, Weller & Tello, P.C.
117 N. Henry Street
Alexandria, VA 223 14-0784

Thomas V. Lydon
Director, Government Affairs
Evergreen International Airlines, Inc.
1629 K Street, N.W.
Suite 301
Washington, D.C. 20006

John L. Richardson
Crispen & Brenner
1100 New York Avenue, N.W.
Suite 850
Washington, D.C. 20005

William C. Evans
Vemer, Liipfert, Bernhard, McPherson
and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Aaron Goerlich
Boros & Garofalo, P.C.
120 1 Connecticut Avenue, N. W.
Suite 700
Washington, D.C. 20036

Irwin P. Altschuler, Esq.
Donald S. Stein, Esq.
Stephanie E. Silverman, Sr. Advisor
Manatt, Phelps & Phillips, LLP
1501 M Street, N.W.
Suite 700
Washington, D.C. 20005-1702

David M. O'Connor
Director, External Relations, U.S.
International Air Transport
Association
1776 K Street, N.W.
Suite 400
Washington, D.C. 20006

Samuel Crane
President
Regional Business Partnership
(Newark)
One Network Center
Newark, NJ 07102

Director of Aviation
Port Authority of New York and New
Jersey
One World Trade Center
Suite 65-N
New York, NY 10048